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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMON MARSHALL NEWQUIST,

Defendant and Appellant.

E053862

(Super.Ct.Nos. FSB037368,
FSB042723)

OPINION

APPEAL from the Superior Court of San Bernardino County. Douglas A. Fettel, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Anthony Da Silva and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Defendant challenges the trial court's 2011 denial of his motion to withdraw his 2003 guilty plea, after remand by this court for a full hearing on the motion. Defendant contends his mental condition prevented him from exercising his free and clear judgment when he pled guilty, his counsel was ineffective, and the trial court improperly coerced him to plead guilty. As discussed below, we conclude that each of these claims lacks merit and so affirm the trial court's ruling denying the motion to withdraw.

FACTS AND PROCEDURE¹

On July 17, 2003, defendant was charged with residential burglary (Pen. Code, § 459)² after he broke into a neighbor's apartment through a bedroom window. The information alleged that defendant had a prior "strike" conviction for robbery. (§§ 211 & 1170.12, subds. (a)-(d).) Defendant pled not guilty and denied the prior strike allegation.

On August 15, 2003, defendant agreed to withdraw his not guilty plea. He entered a plea of guilty and admitted the prior strike allegation. However, immediately thereafter, the trial court allowed defendant to withdraw his guilty plea because counsel had misinformed defendant about the amount of time he would actually have to serve. On August 29, 2003, the trial court granted defendant's *Marsden*³ motion and appointed new counsel.

¹ The facts are taken from unpublished opinion E039086, filed August 31, 2006.

² All further statutory references will be to the Penal Code unless otherwise indicated.

³ *People v. Marsden* (1970) 2 Cal.3d 118.

On September 26, 2003, defendant for the second time withdrew his not guilty plea and agreed to plead guilty to residential burglary. This is the guilty plea at issue in this appeal. Under the plea agreement, defendant also admitted the prior strike allegation and was sentenced to 17 years in prison. In exchange, defendant was released that day under a *Vargas*⁴ waiver on the condition that his sentence would be reduced to eight years if he appeared on November 12, 2003, for resentencing and did not commit any criminal acts in the meantime.

Defendant did not appear for resentencing and so a bench warrant was issued for his arrest. On January 26, 2004, defendant was charged with three new crimes from the period during which he was out of custody on the *Vargas* waiver.⁵ He was arraigned on the bench warrant on January 28, 2004. The trial court denied bail.

On February 25, 2004, the day defendant was to be resentenced, he stated he wanted to withdraw his guilty plea. On March 24, 2004, defense counsel declared a doubt as to defendant's mental competence. The trial court suspended all proceedings pending assessment by a mental health professional. On April 28, 2004, the trial court reviewed the medical reports, found defendant competent, and reinstated all proceedings. On that date, defendant again indicated he wanted to withdraw his guilty plea.

⁴ *People v. Vargas* (1990) 223 Cal.App.3d 1107.

⁵ These additional crimes are not the subjects of this appeal.

After numerous continuances, the trial court granted defendant's second *Marsden* motion on November 30, 2004. New counsel filed defendant's motion to withdraw his guilty plea of September 26, 2003.

After more continuances, the hearing on defendant's motion was set for September 28, 2005. On that date, the trial court sentenced defendant to 17 years pursuant to the *Vargas* waiver, but did not address defendant's motion to withdraw his guilty plea. Defendant appealed. In an unpublished decision in case number E039086, dated August 31, 2006, this court remanded the case to the trial court to resolve defendant's motion to withdraw his guilty plea by conducting a hearing in accordance with section 1018.

On May 27, 2011, after much delay, the trial court held an evidentiary hearing at which appellant and his former defense counsel testified. After hearing argument by both sides and reviewing the reporter's transcript of defendant's September 26, 2003, guilty plea, the trial court denied defendant's motion to withdraw his guilty plea. This second appeal followed.

DISCUSSION

Defendant argues the trial court at the 2011 hearing erred when it denied his motion to withdraw his guilty plea because he presented clear and convincing evidence that: 1) his mental condition at the time of the plea prevented him from exercising his free and clear judgment; 2) defense counsel was ineffective for failing to explain to him that he was pleading guilty to a strike offense; and 3) the trial court improperly coerced defendant into pleading guilty.

Section 1018 provides, “On application of the defendant at any time before judgment . . . the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.” While the statute by its terms is to be “liberally construed,” the defendant has the burden of showing, by clear and convincing evidence, good cause for withdrawing his plea. (§ 1018; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.) To establish good cause, the defendant must show that he was operating under mistake, ignorance, inadvertence, fraud, duress, or any other factor overriding his free judgment. (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496; *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) A plea may not be withdrawn simply because a defendant has changed his mind. (*In re Brown* (1973) 9 Cal.3d 679, 686, overruled on another ground in *People v. Mendez* (1999) 19 Cal.4th 1084, 1092-1093, 1097.) A trial court’s decision to grant or deny a defendant’s motion to withdraw his guilty plea is reviewed for abuse of discretion. (*People v. Mickens* (1995) 38 Cal.App.4th 1557, 1561.) Discretion is abused when a court acts in an arbitrary, capricious, or patently absurd manner, which results in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) In determining whether a defendant has shown good cause for granting a motion to withdraw a guilty plea, the reviewing court must adopt the trial court’s factual findings if they are supported by substantial evidence. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.)

The evidence at the hearing, which must be “clear and convincing,” that defendant was entitled to withdraw his guilty plea was as follows. Defendant’s attorney at the time of the challenged guilty plea testified that he remembered defendant “certainly” and his

case “in a general sense,” meaning “Some details, yes. Most details, no.” Counsel remembered discussing with defendant defendant’s mental health and medications, but did not recall defendant saying that he did not understand the plea proceedings. Counsel did not specifically remember what he explained to defendant about the plea deal, but testified that he had, in 2003, been in practice for 15 or 16 years and had a “custom and practice” of explaining to defendants the implications of pleading guilty to a “strike,” and going over each section of the plea form with the defendant. Counsel recalled that defendant initially did not want to take any plea deal, but changed his mind because he wanted to get out of custody for family reasons. Counsel testified that it is typically the client rather than he who requests a *Vargas* waiver, usually because the client has a need to be released to take care of business or family matters before they go away to prison. Counsel testified that his custom and practice is that if he believes his client does not understand the terms of the plea agreement, he does not sign the agreement and explains to the court that he will not be a party to it.

Defendant testified by reading from his declaration that he changed his mind and decided to take the plea deal in 2003 when the judge “got on the bench” and told him that he would get a sentence of 17 years if he went to trial, or, if he waited, the People’s offer would go up from the eight years they were offering. Defendant also testified that he relied on the judge’s statement that defendant’s strike could not be stricken, and that if he did not plead guilty he would have to serve 85 percent of a 17-year sentence rather an eight-year sentence. Defendant answered “yes” when asked if this (the actual time to be served) was “a crucial factor” in his decision to plead guilty at that time. Defendant

testified “I think I told him at that time I really didn’t want to take it” and that both the judge and his attorney wanted defendant to take the deal. Defendant testified that he did not recall his attorney telling him that he would be pleading guilty to a second strike or explaining its implications. Defendant would not have entered into the plea bargain agreement if he had known he was pleading guilty to a new strike. Regarding the *Vargas* waiver, defendant stated when questioned as to whether he understood that if he did not appear in court as scheduled he would get 17 years: “No, not 100 percent. I didn’t know exactly. I mean, I did, but I didn’t. . . . [¶] . . . [¶] I didn’t know that was set in stone, period. . . . I didn’t know it was not negotiable. . . . I didn’t know for sure.” Regarding defendant’s mental state during the 2003 plea, he testified “I had been hearing voices, and I still do to this day. At that time I was hearing voices. I had the feeling of – I had anxiety real, real bad. I had a feeling of impending doom, that something bad was going to happen, period. And yes, that’s about it.” Defendant testified that he had been diagnosed with “bipolar psychotic attention deficit disorder.”

After reviewing the law and this record, we conclude the trial court at the May 27, 2011, hearing on his motion to withdraw his plea, did not abuse its discretion when it ruled that defendant had not established by clear and convincing evidence that good cause existed to allow him to withdraw his 2003 guilty plea. First, regarding whether defendant’s mental condition prevented him from exercising his free and clear judgment when he pled guilty, the trial court, at the motion to withdraw hearing, reasonably credited defense counsel’s testimony that he generally does not sign off on plea agreements if he believes the defendant does not understand its terms. The trial court

also reasonably discredited defendant's self-serving testimony that he was hearing voices and was "anxious" to the extent that it prevented him from exercising his free and clear judgment. In addition, defendant testified that he still hears voices "to this day," but it does not appear in this record that this at all prevented him from fully participating in the motion hearing. Finally, defendant presented no independent expert testimony or other evidence other than his own testimony to show that his mental health should have kept him from entering into the plea agreement, and such a deficit was not apparent in the record transcript of the 2003 plea hearing. In the 2003 plea hearing, the trial court went over each part of the plea agreement with defendant and he indicated that he knowingly and willingly entered into it.

Second, regarding whether defense counsel was ineffective for failing to explain to him that he was pleading guilty to a second strike offense, again, the trial court was entitled to credit the testimony of defense counsel that it was his practice to thoroughly explain each portion of a plea agreement, in particular when a defendant was pleading guilty to a strike offense. In addition, defendant had previously pled guilty to a strike. Third, regarding whether the judge improperly pressured defendant to plead guilty, again defendant presented no evidence other than his own self-serving testimony that he felt coerced by the trial court to plead guilty. No such coercion appears on the record and defense counsel did not corroborate defendant's description of events. In fact, defense counsel testified that, although defendant initially did not want to take any deal, he finally decided to plead guilty so he could be released from custody to take care of some family business. In addition, as the trial court at the motion hearing pointed out, he was not

persuaded that the judge in the 2003 plea hearing overwhelmed defendant's rational decision making abilities with his comments, both because defendant was getting a good deal, and because defendant was experienced with the criminal justice system, was "bright" and "articulate," and did not present any evidence other than his own testimony that the judge's comments improperly influenced him.

For these reasons, we conclude that the trial court did not abuse its discretion when it found that defendant did not establish by clear and convincing evidence that he was prevented from exercising his free judgment when he entered the 2003 guilty plea.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.